No. 04-433

In the Supreme Court of the United States

JOSEPH ANZA, VINCENT ANZA, AND NATIONAL STEEL SUPPLY, INC.,

Petitioners,

v.

IDEAL STEEL SUPPLY CORP.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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Petition for Certiorari filed September 29, 2004
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RELEVANT DOCKET ENTRIES

United States District Court
for the Southern District of New York
Civil Docket for Case No. 1:02-cv-04788-RMB

Date Filed	#	Docket Text
06/20/2002	1	COMPLAINT filed. Summons issued and Notice pursuant to 28 U.S.C. 636(c). FILING FEE $150.00 RECEIPT # 442616. (jol) (Entered: 06/24/2002)
10/11/2002	5	NOTICE OF MOTION (FILED ON SERVICE DATE) by National Steel, Inc. for an order purs. to Rule 12(b)(6) and Rule 9(b) dismissing this action. No Return Date indicated. (db) (Entered: 11/01/2002)
10/21/2002	7	DECLARATION of Richard L. Huffman by National Steel, Inc. in support Re: [5-1] motion for an order purs. to Rule 12(b)(6) and Rule 9(b) dismissing this action. (db) (Entered: 11/01/2002)

04/02/2003	11	DECISION AND ORDER; granting [5-1] motion for an order purs. to Rule 12(b)(6) and Rule 9(b) dismissing this action; the Court respectfully request that the Clerk close this case. (signed by Judge Richard M. Berman); forwarded this document to the Judgment Clerk. (pl) (Entered: 04/02/2003)
04/07/2003	12	JUDGMENT, that for the reasons stated in the Court's Decision and Order dated 4/1/03, defts' motion to dismiss is granted; accordingly, the case is closed (signed by J. Michael McMahon, Clerk of Court); Mailed copies and notice of right to appeal. Entered On Docket: 4/8/03. (cd) (Entered: 04/08/2003)
04/18/2003	13	NOTICE OF APPEAL by Ideal Steel Supply from [12-1] judgment order, [11-1] order. Copies of notice of appeal mailed to Attorney(s) of Record: Richard L. Huffman. $105.00 Appeal filing fee paid 4/18/03 on receipt # E 471457. (dt) (Entered: 04/18/2003)

08/11/2003	15	AMENDED COMPLAINT by Ideal Steel Supply (Answer due 8/21/03 for National Steel, Inc., for Vincent Anza, for Joseph Anza) amending [1-1] complaint; Summons issued. (dle) (Entered: 09/04/2003)
08/12/2003	19	MANDATE of USCA (Certified Copy) as to [13] Notice of Appeal filed by Ideal Steel Supply Corp. USCA Case number 03-7381. Ordered, Adjudged and Decreed that the judgment of the District Court is VACATED and REMANDED in accordance with the opinion of this court. MACKECHNIE, Clerk USCA. Issued as Mandate: 7/27/04. (pr,) (Entered: 08/02/2004)

United States Court of Appeals
for the Second Circuit
Docket No. 03-7381-cv

9/9/03	Appellant Ideal Steel Supply C brief FILED with proof of service. [DT]
9/9/03	Appellant Ideal Steel Supply C joint appendix filed w/pfs. Number of volumes: 1. [DT]
10/9/03	Appellee Joseph Anza, Appellee Vincent Anza, Appellee National Steel Suppl brief filed with proof of service. [DT]
11/28/03	Appellant Ideal Steel Supply C reply brief filed with proof of service. [DT]
12/16/03	Case heard before WALKER, CH.J; KEARSE, CABRANES, C.JJ . (TAPE: CD date: 12/16/03) [DT]
7/2/04	Judgment of the district court is Vacated and Remanded by published signed opinion filed. (ALK) [EA]
7/2/04	Judgment filed. [EA]
7/27/04	Judgment MANDATE ISSUED. CLOSED [AM]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed September 13, 2002]

02 CIV. 4788 (RMB)

IDEAL STEEL SUPPLY CORP.,	)
Plaintiff,	)
	)
v.	)
	)
JOSEPH ANZA, VINCENT ANZA	)
and NATIONAL STEEL SUPPLY, INC.,	)
Defendants.	)
	)

AMENDED COMPLAINT

PLAINTIFF DEMANDS A JURY TRIAL

Plaintiff Ideal Steel Supply Corp. ("Ideal") by its attorneys, Ross & Hardies, for its complaint alleges as follows:

Preliminary Statement

1. Upon information and belief, defendant National Steel Supply, Inc. ("National") and its owners, defendants Joseph and Vincent Anza, have engaged in an unlawful racketeering scheme, the intent and direct effect of which is to cause Ideal, National's principal competitor, to lose a substantial part of its business to National.

2. Ideal and National each distribute and sell various forms of steel mill products and related hardware, supplies and services in a "lumber yard" setting to ornamental ironworkers, small steel fabricators and do-it-yourself homeowners. They compete in the same market to sell the same products and services to the same customer base.

3. Ideal and National each have two locations in the Bronx and in Jamaica, New York, a few minutes' drive from each other. No other businesses in the Bronx or Queens sell the same or a similar comprehensive array of products and services or compete for the same customers. As Ideal and National sell at nearby locations similar product lines of generic commodities, they compete principally on the basis of price.

4. Although Ideal and National are alike in many ways, National differs from Ideal in the following essential respect: Upon information and belief, by direction and control of its owners, Joseph and Vincent Anza, National, in violation of New York State tax laws, does not charge or collect sales tax on taxable sales from its cash-paying non-exempt customers, and does not report these sales or pay the required sales tax on them to the New York State Department of Taxation and Finance.

5. Upon information and belief: To further their "cash, no tax" scheme, defendants knowingly must and do make, on a regular basis, fraudulent misrepresentations to government agencies regarding National's taxable sales and the resulting sales tax owed. National regularly and repeatedly files, by U.S. mail or electronically, false safes tax returns to the New York State Department of Taxation and Finance, returns which deliberately understate National's taxable cash sales and the sales taxes collected and due on National's taxable

cash sales. These false filings violate the federal mail fraud statutes as well as state tax laws.

6. Defendants' unlawful "cash, no tax" racketeering scheme directly injures Ideal. National offers customers a substantial savings over Ideal because National does not charge, collect or pay the required sales tax of 8¼% on non-exempt cash sales, thereby reducing the total price paid by customers making cash purchases at National, without reducing National's profit margin. Since price competition is the principal way customers choose between Ideal and National, National's unlawful price advantage has caused Ideal to lose business to National and enabled National to gain sales and market share at Ideal's expense.

7. As set forth more fully below, the "cash, no tax" scheme constitutes a pattern of racketeering for which defendants are each civilly liable for treble damages under 18 U.S.C. § 1964(c).

8. Defendants' scheme further constitutes a material breach of a stipulation that several of the parties entered into in 1997 to settle litigation between them. Defendants agreed not to interfere with plaintiff's business activities "other than through legitimate and proper competition." Defendants' fraudulent and unlawful "cash, no tax" scheme interferes with Ideal's business and is neither legitimate nor proper competition.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1367 and the doctrine of supplemental jurisdiction.

10. This Court has personal jurisdiction over defendants by virtue of their transacting and doing business in this district.

11. Venue is proper under 28 U.S.C. § 1391 as a substantial part of the events giving rise to the claims occurred in this district.

THE PARTIES

12. Plaintiff Ideal Steel Supply Corp. is a New York corporation with places of business in the Bronx and Queens, New York.

13. Defendant National Steel Supply, Inc. is a New York corporation with places of business in the Bronx and Queens, New York.

14. Joseph and Vincent Anza are father and son, each living in Easton, Connecticut, who together own, control and operate National.

FACTS COMMON TO ALL CLAIMS

15. Ideal and National are the principal competitors in New York City for the types of products they each sell.

16. Ideal and National are the only vendors in the Bronx and Queens offering a comprehensive mix of steel mill products (such as steel bars and sheets) and related hardware, supplies and services, to ornamental iron workers and small steel fabricators. The products and services offered by Ideal and by National are virtually the same. Ideal and National each offer their products and services in a "lumber yard" setting, conducting much of their business on a "cash and

carry" basis with no minimum order required, thereby providing convenient, one-stop shopping for the professional ironworkers, small steel fabricators and do-it-yourself homeowners they serve.

17. Ideal and, upon information and belief, National, purchase the steel and other products they sell from manufacturers outside of New York State and sell those products for use in the New York, New Jersey and Connecticut tri-state area. Their customers are located throughout the tri-state area with a concentration in the Bronx and Queens.

18. Sales of products by Ideal and National are taxable unless made on a "resale" basis (i.e., for further taxable sale by a qualified purchaser in the products' original for or after further fabrication). Resale sales are exempt from taxation so long as the purchaser furnishes Ideal or National with the proper documentation from the New York State Department of Taxation and Finance. Sales that are not made on a resale basis may be exempt from taxation if the goods are for use in a job for a tax-exempt entity (such as a school, government building, church or other not-for-profit facility) so long as the purchaser furnishes Ideal or National with the proper documentation mandated by the New York State Department of Taxation and Finance.

19. Ideal and National have each been vendors of steel mill products and related supplies and services at their respective present locations in Jamaica, in the Borough of Queens, New York City, for more than ten years. Ideal is located at 112-17 159th Street. National is located at 145-64 Liberty Avenue, less than a four minute drive from Ideal's location. There are no other vendors in the Borough of Queens that carry the same or a similar comprehensive array

of products and services serving the same customers.

20. Ideal has also maintained a location at 1278 Viele Avenue in the Bronx since November 1996. In or about the summer of 2000, National opened up a Bronx location at 700 Havemeyer Avenue, just eight minutes by automobile from Ideal's Bronx location. There are no other vendors in the Bronx that carry the same or a similar comprehensive array of products and services serving the same customers.

21. Ideal and National compete primarily on the basis of price. The products they each sell consist largely of commodities which are not sold on the basis of brand or manufacturer. In most, if not all, instances, from their customers' perspective, the only significant difference in goods and services purchased from Ideal or National is the total price the customer has to pay for the products.

22. While differences in prices charged by Ideal and National affect customers' decisions to purchase from one or the other, the overall demand for the products offered by Ideal and National is not significantly affected by changes in the prices Ideal and National charge. Rather, the total demand in the market served by Ideal and National is dependent primarily upon economic activity in the real estate and construction businesses and the overall demand, generally, for ornamental security or other ironworks products at a given time. Neither Ideal nor National can substantially increase the overall demand for the products and services they sell by reducing prices or through advertising and other marketing efforts. Therefore, increases in sales by Ideal or by National that do not result from changes in overall market demand will generally come at the expense of the other's sales.

23. Under New York State Tax Law (the "Tax Law"),

sales to end users by Ideal and by National are subject to state and local sales tax, currently 8¼ % of the selling price, except that sales to purchasers with valid resale certificates are exempt from the sales tax. All sales are presumed by law to be taxable unless a valid resale or exempt certificate is furnished by the purchaser to Ideal or National within 90 days of purchase.

24. National and Ideal are obligated under Tax Law §§ 1101, 1105, and 1131-37 to advise each customer of the amount of tax due on a sale and to charge, collect and pay to the State the applicable sales tax on all taxable sales. Among other things, section 1132 of the Tax Law requires that every sales slip, invoice or receipt given to a customer separately state the amount of sales tax charged on that particular sale.

25. The Tax Law requires National and Ideal to report to the New York State Department of Taxation and Finance, on a monthly or quarterly basis, the amount of sales receipts for taxable sales and the amount of state and local sales tax due thereupon. Quarterly returns are due on March 20, June 20, September 20 and December 20 of each year. Monthly returns, if required, are due on the 20th of each month. Ideal and National are obligated by the Tax Law to pay the State the requisite sales taxes collected for the previous quarterly or monthly reporting period at the time they each file their respective quarterly (or monthly) returns.

26. As the sole owners of National, defendants Joseph and Vincent Anza direct and control National's activities in connection with National's state-mandated obligations of charging and collecting sales tax, making sales tax payments to the State and filing sales tax returns.

27. In violation of these laws, defendants Joseph and

Vincent Anza have, upon information and belief, schemed to run a "cash, no tax" business. When National's customers pay in cash, National's employees, as directed by defendants Joseph and Vincent Anza, do not charge or collect the required sales tax. In such instances, National provides to the customer a receipt on which only a single price is given and on which no sales tax is indicated. National's sales receipts do not represent that sales tax is included in the price.

28. Upon information and belief, National, at the direction of Joseph and Vincent Anza, does not report or pay to the State sales tax on those taxable sales for which National did not charge the tax to its customers.

29. Upon information and belief, defendants Joseph and Vincent Anza have furthered their unlawful "cash, no tax" scheme by filing or causing National's bookkeepers or accountants to file, by U.S. mail or electronically on a quarterly or monthly basis, for each reporting period starting in 1998 if not earlier, state sales tax returns on behalf of National that they know to be false. Upon information and belief, in each of these returns, defendants misrepresented the total amount of taxable sales and the amount of sales tax collected for the quarter (or month) for which each return accounts.

30. Upon information and belief, based on the fraudulent misrepresentations in National's sales tax returns, upon which the New York State Department of Taxation and Finance has relied and continues to rely, National has been able to avoid paying sales tax on a significant portion of its taxable sales. The false returns, and the State's reliance thereon, are essential for defendants to avoid paying required sales tax and to continue the scheme over an extended period of time. Defendants' "cash, no tax" racketeering scheme,

including their knowing filing of false returns, continues to the present day.

31. Upon information and belief, defendants' unlawful "cash, no tax" scheme involves the participation of various individuals who are as yet unknown to plaintiff and who act at the direction of Joseph and Vincent Anza to perpetrate and continue this scheme. Those individuals may include various National employees involved in sales, National's clerical or bookkeeping staff, and its accountants.

32. The purpose and direct effect of defendants' unlawful failure to collect tax on taxable sales, and their failure to pay such tax to the State by filing false sales tax returns, is to create an improper competitive advantage for National over Ideal. By failing to charge and collect sales tax and failing to remit sales tax to the State on taxable sales, which can only be accomplished on a continuing basis through false returns, National is able to reduce the total amount its cash customers pay by 8¼% without reducing its own profit margin.

33. Upon information and belief, Ideal's prices are the same or lower on average than National's. Where National does not charge sales tax on taxable sales, however, the overall cost to customers is typically lower than at Ideal for the same goods and services, because Ideal charges the sales tax.

34. But for defendants' scheme, National would not have a competitively significant price advantage over Ideal.

35. Defendants' scheme has had a significant deleterious effect on Ideal's business. For example, Ideal experienced a steep drop in taxable cash sales after National

opened its Bronx facility that was disproportionate to the effect that National's new Bronx location had on Ideal's overall sales, including non-cash taxable sales and tax-free sales made to purchasers with a valid resale or tax-exempt certificate.

36. Legitimate business competition cannot explain the dramatically disproportionate decline in Ideal's taxable cash sales in comparison with Ideal's other sales for which National cannot offer an unlawful savings under its "cash, no tax" scheme. This disparity can only be explained by National's unlawful price advantage gained from its unlawful "cash, no tax" scheme.

FIRST CAUSE OF ACTION
(Against Defendants Joseph Anza and Vincent Anza)
(Civil RICO, 18 U.S.C. §§ 1962(c) and 1964)

37. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 36 of this Complaint as if fully set forth herein.

38. Defendants Joseph and Vincent Anza are "persons" under 18 U.S.C. § 1961.

39. National is an "enterprise" as defined in 18 U.S.C. § 1961.

40. National engages in interstate commerce. Upon information and belief, it purchases steel and other products from manufacturers outside of New York State and sells those products for use in the New York, New Jersey and Connecticut tri-state area.

41. Defendants Joseph and Vincent Anza own and are

associated with National.

42. Defendants Joseph and Vincent Anza, through their direction and control of National, have engaged in racketeering conduct.

43. The unlawful "cash, no tax" scheme run by defendants Joseph and Vincent Anza is a scheme to gain a competitive advantage over Ideal and increase National's market share at Ideal's expense by defrauding the New York State Department of Taxation and Finance of sales tax revenues due on taxable sales which National is obligated by law to collect and pay.

44. Upon information and belief, in furtherance of this scheme, National filed false state sales tax returns by mailing the returns with the United States Postal Service.

45. By filing, or directing National to file, by U.S. mail New York State sales tax returns that they knew to be fraudulent on a quarterly (or monthly) basis for each reporting period at least since 1998 if not before, defendants Joseph and Vincent Anza on each occasion violated the federal mail fraud statute (18 U.S.C. §§ 1341). Each violation constitutes a predicate act of racketeering under 18 U.S.C. § 1961(b).

46. To the extent that any of the false returns are filed with the State electronically, defendants have also violated 18 U.S.C. § 1343. Each violation of this statute is a predicate act of racketeering.

47. Defendants' filing of false sales tax returns on a quarterly or monthly basis constitutes a related and continuous pattern of racketeering activity under 18 U.S.C. § 1962. Each false sales tax return covers a distinct period for which

National failed to collect and remit to the state sales taxes owed from its taxable sales for that period, as required by law. Each false return constitutes a distinct fraud, yet reveals a single scheme which continues today.

48. The unlawful "cash, no tax" scheme of defendants Joseph and Vincent Anza directly injures Ideal because the unlawful tax saving is intended to and does attract customers to make purchases from National which would otherwise have been made from Ideal.

49. National can realize its unlawful tax saving only because the New York State Department of Taxation and Finance relies on National's false returns in accepting defendants' representations as to the amount of taxable sales and resulting sales tax owed. Upon information and belief, defendants' fraud, while perpetrated on the State, is directed at and directly injures Ideal because defendants' conduct is aimed at increasing National's market share and overall profits at the expense of its principal competitor, Ideal. Defendants pass on to National's customers the sales tax "savings" that National realizes as a result of its false returns, thereby increasing its sales and customer base through lower overall pricing without decreasing its profit margin. Thus, defendants profit from their scheme only by gaining business at Ideal's expense.

50. As a direct result of defendants' racketeering scheme and National's false state tax returns, Ideal has lost a substantial volume of its taxable cash business which has cost and continues to cost Ideal a substantial amount of profits and market share.

51. By reason of the foregoing, Ideal has been damaged in lost profits in an amount to be judicially

determined but believed to exceed $5,000,000. Pursuant to 18 U.S.C. § 1964(c), Ideal is entitled to recover treble damages in an amount to be judicially determined but believed to exceed $15,000,000.

SECOND CAUSE OF ACTION
(Against All Defendants)
(Civil RICO, 18 U.S.C. §§ 1962(a) and 1964)

52. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 51 of this Complaint as if fully set forth herein.

53. For purposes of 18 U.S.C. § 1962(a), National is also a "person" under 18 U.S.C. § 1961.

54. For many years, defendants Joseph and Vincent Anza and National have received income or proceeds derived from their unlawful "cash, no tax" racketeering scheme from sales at their Jamaica location.

55. Defendants Joseph and Vincent Anza and National invested racketeering income or proceeds derived from the conduct of their unlawful "cash, no tax" scheme at their Jamaica location to open National's Bronx location in or about the summer of 2000.

56. National's Bronx location is an enterprise under 18 U.S.C. § 1961 engaged in interstate commerce. Upon information and belief, National sells at its Bronx location steel and other products it purchased from manufacturers outside of New York State for use in jobs throughout the New York, New Jersey and Connecticut tri-state area.

57. Ideal has been and continues to be directly injured

by defendants' investment of racketeering proceeds or income in creating National's Bronx location and carrying on defendants' "cash, no tax" scheme at that location. As a result of defendants' investment of racketeering proceeds or income in the Bronx facility, Ideal has lost significant business and market share.

58. By reason of the foregoing, Ideal has been damaged in an amount to be judicially determined but believed to exceed $2,000,000. Pursuant to 18 U.S.C. § 1964(c), Ideal is entitled to recover treble damages in an amount to be judicially determined but believed to exceed $6,000,000.

THIRD CAUSE OF ACTION
(Against All Defendants)
(Breach of Contract)

59. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 58 of this Complaint as if fully set forth herein.

60. In 1994, National and other businesses owned and operated by Joseph and Vincent Anza filed a lawsuit against Ideal seeking damages for Ideal's alleged interference with National's customers and employees. *National Security Gates, Inc. et al. v. Vincent Brancato and Sons, Inc., et al.*, New York State Supreme Court, Queens County, Index No. 014536/94. The suit named Ideal as one of the defendants.

61. That lawsuit was discontinued pursuant to a "Stipulation of Settlement" dated January 14, 1997, entered into by National and Ideal among others, and signed by National and Ideal. Defendant Vincent Anza signed on National's behalf.

62. The Stipulation of Settlement is an enforceable contract governed by New York law.

63. Among other things, the Stipulation of Settlement provides that "both parties agree to stay away from and otherwise not interfere with each others [sic] business activities, other than through legitimate and proper competition" (emphasis added). That provision is material to the agreement.

64. Defendants' unlawful "cash, no tax" scheme, by definition, is neither legitimate nor proper competition.

65. Defendant's unlawful "cash, no tax" scheme interferes with Ideal's business because its direct purpose and effect is to gain market share for National at Ideal's expense through unlawfully reduced total pricing.

66. Defendants Joseph and Vincent Anza and National therefore have breached the Stipulation of Settlement by interfering with Ideal's business activities through illegitimate and improper means.

67. By reason of the foregoing, Ideal has been damaged in an amount to be judicially determined but believed to exceed $5,000,000.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request judgment be entered against defendants, jointly and severally, for the following:

a. Compensatory damages on the first cause of action under 18 U.S.C. § 1962(c) in an amount to be judicially

determined but believed to exceed $5,000,000, trebled pursuant to 18 U.S.C. § 1964(c) to an amount to be judicially determined but believed to exceed $15,000,000;

b. Compensatory damages on the second cause of action under 18 U.S.C. § 1962(a) in an amount to bo judicially determined but believed to exceed $2,000,000, trebled pursuant to 18 U.S.C. § 1964(c) to an amount to be judicially determined but believed to exceed $6,000,000;

c. Compensatory damages on the third cause of action for breach of contract in an amount to be judicially determined but believed to exceed $5,000,000;

d. The costs and disbursements of this action, including attorneys' fees pursuant to 18 U.S.C. § 1964(c); and

e. Such other relief as the court deems just and proper.

Dated: New York, New York
September 13, 2002

/s/ _____

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

02 Civ. 4788 (RMB)

[Filed April 2, 2003]

IDEAL STEEL SUPPLY CORP., Plaintiff,	)
v.	)
JOSEPH ANZA, VINCENT ANZA and NATIONAL STEEL SUPPLY, INC., Defendants.	)

RICHARD M. BERMAN, U.S.D.J.

DECISION AND ORDER

I. Background

In this action, filed in June 2002, Ideal Steel Supply Corp. ("Plaintiff" or "Ideal") alleges that National Steel Supply, Inc. ("National") and its owners, Joseph and Vincent Anza (collectively, "Defendants"), engaged in a "racketeering" scheme in violation of 18 U.S.C. §§ 1962(a) and (c)("RICO"). Ideal's amended complaint also includes a state law breach of contract claim. Defendants move to dismiss pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 12(b)(6) and 9(b).

The Court treats the following allegations in the amended complaint ("AC") as true for the purposes of this motion. *See Piccone v. Bd. of Directors of Doctors Hosp.*, 97 Civ. 8182, 2000 U.S. Dist. LEXIS 12249, 2000 WL 1219391, at *1 (S.D.N.Y. Aug. 28, 2000).

Ideal and National distribute and sell steel mill products and related hardware, supplies, and services, including steel bars and sheets, in a "lumber yard" setting to ornamental ironworkers, small steel fabricators, and do-it-yourself homeowners. (ACPP2, 16.) Ideal and National each have two store locations, one in the Bronx and one in Jamaica, Queens. (ACPP3, 19-20.) Each one of Ideal's stores is located within a few minutes of each of National's stores. (ACPP19-20.)

National is Ideal's principal competitor in New York City for the products it sells. (ACP15.) No other business in the Bronx or Queens sells "the same or a similar comprehensive array of products and services or competes for the same customers." (ACPP3, 16, 19-20.) "As Ideal and National sell at nearby locations similar product lines of generic commodities, they compete principally on the basis of price." (ACPP3, 21.) Demand in the market does not fluctuate based on price, but on the robustness of the construction industry. (ACP22.) Accordingly, Ideal and National can not increase demand by reducing prices or aggressively marketing their products. (ACP22.) Increases in sales at one of the competitor's stores -- if not caused by overall market demand -- generally occurs with concomitant decreases in the other's sales. (ACP22.)

The products Ideal and National sell are taxable at 8.25% unless they fall within one of the New York State sales tax

exemptions.[1] (ACPP18, 23.) New York State tax law requires businesses to pay the taxes collected and to submit an account of taxable sales in monthly or quarterly returns. (ACP25.) It is alleged that National does not charge cash-paying customers sales tax (on taxable sales) in violation of New York State sales tax laws. (ACPP4, 27.) Defendants do not report or pay to the New York State Department of Taxation and Finance any sales tax on the sales for which Defendants illegally ignore sales tax. (ACPP4, 28.) Since 1998 and continuing to today, National has filed (either by U.S. mail or electronically) fraudulent sales tax returns with the New York State Department of Taxation and Finance. (ACPP5, 29, 44, 47.)The returns misrepresent the amount of taxable sales at National and the amount of sales tax National collects each reporting period. (ACP29.)

Defendants' "cash, no tax" scheme directly injures Ideal because Ideal cannot charge its customers 8.25% more than National and still compete on price, the principal factor in choosing between Ideal and National. (ACPP6, 48.) "National offers customers a substantial savings over Ideal because National does not charge, collect or pay the required sales tax of 8 1/4% on non-exempt cash sales, thereby reducing the total price paid by customers making cash purchases at National, without reducing National's profit margin." (ACPP6, 32, 49.) As a result of Defendants' "cash, no tax" scheme, Ideal has experienced a decrease in taxable cash sales. (ACPP6, 36, 50.) For example, "Ideal experienced a steep drop in taxable cash sales after National opened its Bronx facility that was disproportionate to the effect that

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[1] The combined New York State and City sales tax equals 8.25%. See N.Y. Tax Law §§ 1105, 1107, 1109 (McKinney Supp. 2003).

National's new Bronx location had on Ideal's overall sales, including non-cash taxable sales and tax-free sales made to purchasers with a valid resale or tax-exempt certificate." (ACP35.) The effect of Defendants' "cash, no tax" scheme "is to create an improper competitive advantage for National over Ideal." (ACPP32, 49.)

"By filing, or directing National to file, by U.S. mail New York State sales tax returns that they knew to be fraudulent on a quarterly (or monthly) basis for each reporting period at least since 1998 if not before, defendants Joseph and Vincent Anza on each occasion violated the federal mail fraud statute (18 U.S.C. § 1341). Each violation constitutes a predicate act of racketeering under 18 U.S.C. § 1961(1)(B). To the extent that any of the false returns are filed with the State electronically, defendants also violated 18 U.S.C. § 1343. Each violation of this statute is a predicate act of racketeering."[2] (ACPP45-46; *see* ACP5.) Ideal claims that this "cash, no tax" scheme constitutes a pattern of RICO racketeering, punishable under 18 U.S.C. § 1962(c), (ACPP7, 45-51); that Defendants (re)invest the money from the alleged RICO scheme in National's Bronx location, punishable under 18 U.S.C. § 1962(a), (ACPP55-58); and that the scheme breaches a settlement agreement the parties executed in a 1997 litigation, wherein National and Ideal agreed, among other things, not to interfere with each others' "business activities other than through legitimate and proper

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[2] *See Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312, 313 (7th Cir. 1985)("Mail fraud qualifies as a racketeering activity under the statute, 18 U.S.C. § 1961(1), and mailing fraudulent state sales tax returns qualifies as mail fraud."); *see also Porcelli v. United States*, 964 F.2d 1306, 1307 (2d Cir. 1992).

competition."[3] (ACPP8, 60-67.) **For the reasons set forth below, the Court grants Defendants' motion to dismiss.**

II. Standard of Review

A complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *see McLaughlin v. Anderson*, 962 F.2d 187, 190 (2d Cir. 1992). In resolving a motion to dismiss, the Court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 380 (2d Cir. 2001); *McLaughlin*, 962 F.2d at 190. In other words, the burden on the movant is very substantial, as the issue before the Court in a Rule 12(b)(6) motion "is not whether a plaintiff is likely to prevail ultimately, 'but whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test.'" *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir. 1995)(quoting *Weisman v. LeLandais*, 532 F.2d 308, 311 (2d Cir. 1976) (*per curiam*)). While "the well-pleaded material allegations of the complaint are taken as admitted...

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[3] "In 1994, National and other businesses owned and operated by Joseph and Vincent Anza filed a lawsuit against Ideal seeking damages for Ideal's alleged interference with National's customers and employees. *National Security Gates, Inc., et al. v. Vincent Brancato and Sons, Inc., et al.*, New York State Supreme Court, Queens County, Index No. 014536/94." (ACP60.) "That lawsuit was discontinued pursuant to a 'Stipulation of Settlement' dated January 14, 1997." (ACP61.)

conclusions of law or unwarranted deductions of fact are not admitted." *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994)(internal quotation omitted). Where, as here, a complaint alleges (mail and/or wire) fraud, the pleading requirements of Fed. R. Civ. P. 9(b) apply. *Id.*; *McLaughlin*, 962 F.2d at 191.

"Civil RICO is an unusually potent weapon--the litigation equivalent of a thermonuclear device. Because the mere assertion of a RICO claim ... has almost inevitable stigmatizing effect on those named as defendants, ... courts should strive to flush out frivolous RICO allegations at an early stage of the litigation." *Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649, 655 (S.D.N.Y. 1996)(citations omitted), *aff'd*, 113 F.3d 1229 (2d Cir. 1997).

III. Analysis

Along with the amended complaint, the Court has reviewed the Memorandum of Law in Support of Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b), dated October 11, 2002 ("Defs. Br."); Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, dated November 8, 2002 ("Pl. Br."); and the Reply Memorandum of Law in Support of Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b), dated November 19, 2002.[4]

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[4] Oral argument is not needed. *See* Letter from Counsel for Defendant, dated Nov. 19, 2002 ("Both sides have agreed that the parties are content to leave the question of oral argument to the Court.")

The Defendants argue, in support of their motion, that (1) Plaintiff lacks standing to bring a RICO claim because Plaintiff does not allege "proximate cause," Def. Br. at 6 ("National's alleged avoidance of New York State sales tax could only directly affect New York State tax collections, not Ideal's business."); (2) Plaintiff has failed to plead the allegations of mail and wire fraud with particularity as required under Fed. R. Civ. P. 9(b); and (3) the Court must dismiss Plaintiff's supplemental state law claims if the Court dismisses the RICO claims.

Plaintiff responds that proximate cause exists under applicable case law. Plaintiff also argues that the amended complaint, fairly read, alleges fraud with sufficient particularity, and, where it lacks particularity, "the relevant facts are peculiarly within the [Defendants'] knowledge." Pl. Br. at 21-22. Plaintiff concedes that if the Court dismisses the RICO claims "the basis for supplemental jurisdiction is attenuated," but adds that a dismissal of the state-law claims would not be on the merits. Pl. Br. at 25 n.12.

"RICO grants standing to pursue a civil damages remedy to 'any person injured in his business or property by reason of a violation of [18 U.S.C. § 1962].' 18 U.S.C. § 1964(c). In order to bring suit under § 1964(c), a plaintiff must plead (1) the defendant's violation of § 1962, (2) an injury to the plaintiff's business or property, and (3) causation of the injury by the defendant's violation." *Commercial Cleaning*, 271 F.3d at 380 (alteration in original). Generally, to satisfy RICO's causation element a complaint must allege that a defendant's violation was both a "but for" or factual cause of plaintiff's injury and the proximate cause, as well. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265-68, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992). In complaints predicated on mail or wire fraud, a plaintiff must plead "'loss causation,'

meaning that the misrepresentation must be both an actual and a proximate source of the loss that the plaintiffs suffered," *Moore v. Painewebber, Inc.*, 189 F.3d 165, 169-70 (2d Cir. 1999), and "transaction causation," which requires a plaintiff to "demonstrate that [plaintiff] relied on defendants' misrepresentations." *Mezzonen, S.A. v. Wright*, 97 CIV. 9380, 1999 U.S. Dist. LEXIS 17625, 1999 WL 1037866, at *5 (S.D.N.Y. Nov. 16, 1999); *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings*, 85 F. Supp. 2d 282, 302 (S.D.N.Y. 2000), *aff'd* 00-7356, 242 F.3d 366, 2001 WL 46565 (2d Cir. Jan. 18, 2001); *see also Moore*, 189 F.3d at 171-72; *Powers v. British Vita, P.L.C.*, 57 F.3d 176, 189 (2d Cir. 1995); *Macomber v. Travelers Prop. Cas. Corp.*, 3:98-CV-01060, 1999 U.S. Dist. LEXIS 2707, 1999 WL 118005, at *2 (D. Conn. Jan. 28, 1999). *See generally* Hon. Jed S. Rakoff & Howard W. Goldstein, RICO: Civil & Criminal Law & Strategy, § 1.07[6], at 1-128 (2002)("The Second Circuit ... requires that in the context of predicate acts grounded in fraud the plaintiff must prove both transaction causation and loss causation.").

Ideal has not plead transaction causation. Although Ideal alleges that the New York State Department of Taxation and Finance relied on Defendants' alleged misrepresentations (ACP30), Ideal has not alleged -- indeed, can not allege -- that Plaintiff relied on the sales tax returns Defendants mailed or wired to the New York State Department of Taxation and Finance. As a result, Ideal's RICO claims fail. *See Odyssey*, 85 F. Supp. 2d at 302 (holding that "to show transaction causation, ... plaintiff must show that it relied on defendant's omission."); *Mezzonen*, 1999 U.S. Dist. LEXIS 17625, 1999 WL 1037866, at *5-*6; *Moore*, 189 F.3d at 169-71.[5]

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[5] *See also Piccone*, 2000 U.S. Dist. LEXIS 12249, 2000 WL 1219391, at *5 (holding that plaintiff "failed to plead sufficient

Plaintiff's reliance on *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374 (2d Cir. 2001)("*Commercial Cleaning*") to establish causation is not compelling. In *Commercial Cleaning*, reliance was not an issue -- the plaintiff based its RICO complaint upon a violation of the Immigration and Nationality Act, 8 U.S.C. § 1324(a). *Commercial Cleaning*, 271 F.3d at 378, 380 (alleging that defendant "engaged in a pattern of racketeering activity by hiring undocumented aliens for profit in violation of Section 274 of the Immigration and Nationality Act"). Ideal, on the other hand, bases its RICO claim on mail and wire fraud -- and that is a critical difference. *See Piccone*, 2000 U.S. Dist. LEXIS 12249, 2000 WL 1219391, at *5 ("If one alleges predicate acts of mail fraud, as [plaintiff] does, it is necessary to allege that the injured party relied on the fraudulent misrepresentations of the defendant, and that the

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facts demonstrating either that he relied on defendants' fraudulent misrepresentations or that such reliance caused him injury"); *B.V. Optische Industrie De Oude Delft v. Hologic, Inc.*, 925 F. Supp. 162, 164 (S.D.N.Y. 1996)(denying motion to reconsider holding that "in alleging mail or wire fraud as predicate acts in a civil RICO complaint, it is necessary to allege that the injured party relied on the fraudulent misrepresentations of the defendant, and that the reliance was the cause of the injury"); *Miller v. Helmsley*, 745 F. Supp. 932, 940 n.5 (S.D.N.Y. 1990)(siding, in dicta, with cases holding that plaintiff must allege it relied on fraud); *accord Corcoran v. American Plain Corp.*, 886 F.2d 16, 19-20 (2d Cir. 1989); *United States v. Evans*, 844 F.2d 36, 39 (2d Cir. 1988). Other courts appear to have held that third-party reliance is sufficient. *See, e.g., Sterling Interiors Group v. Haworth, Inc.*, 94 Civ. 9216, 1996 U.S. Dist. LEXIS 13908, 1996 WL 537482, at *3 (S.D.N.Y. Sept. 23, 1996); *Trautz v. Weisman*, 819 F. Supp. 282, 286 (S.D.N.Y. 1993); *Shaw v. Rolex Watch U.S.A., Inc.*, 726 F. Supp. 969, 973 (S.D.N.Y. 1989); *see also Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990).

reliance was the cause of the injury.").

"We must be content with making our best efforts to make recovery commensurate with the statutory wrong and to set out 'our more or less inadequately expressed ideas of what justice demands' in each case." *Sperber v. Boesky*, 849 F.2d 60, 66 (2d Cir. 1988)(quoting W. Page Keeton, et al., Prosser & Keeton on the Law of Torts 264 (5th ed. 1984)). The Court holds that Plaintiff can not, as a matter of law, allege that it relied on Defendants' alleged misrepresentations to the New York State Department of Taxation and Finance. *See, e.g., Odyssey*, 85 F. Supp. 2d at 302; *see also Moore*, 189 F.3d at 169-70. Consequently, Plaintiff can not satisfy the pleading requirements for its RICO claims. *See Sperber*, 849 F.2d at 60 (dismissing complaint alleging violations of 1962(a) through (d) for failure to plead causation adequately); *Miller*, 745 F. Supp. at 935-40 (same).[6]

Because the Court dismisses Plaintiff's federal (RICO) claims, the Court also dismisses the state law breach of contract claim (without prejudice). *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966); *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 130 (2d Cir. 2003)("In most circumstances, a district court should decline supplemental jurisdiction if all federal claims have been dismissed at the pleading stage."); *Piccone*, 2000 U.S. Dist. LEXIS 12249, 2000 WL 1219391, at *7 (dismissing state law claims without prejudice to refiling in state court);

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[6] Because the Court dismisses Plaintiff's RICO claims on causation grounds, the Court need not address Defendants' alternative argument that the pleading fails to comply with the particularity requirements of Fed. R. Civ. P. 9(b). *See Barr Labs., Inc. v. Quantum Pharmics, Inc.*, 827 F. Supp. 111, 116 n.6 (E.D.N.Y. 1993); *Miller*, 745 F. Supp. at 934.

see Pl. Br. at 25 n.12.

IV. Conclusion and Order

For the reasons stated, the Court grants Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The Court respectfully requests that the Clerk close this case.

Dated: April 1, 2003

/s/
RICHARD M. BERMAN, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 03-7381

[Filed July 2, 2004]

IDEAL STEEL SUPPLY CORP.,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
JOSEPH ANZA, VINCENT ANZA,	)
and NATIONAL STEEL SUPPLY, INC.,	)
Defendants-Appellees.	)
	)

Appeal from a judgment of the
United States District Court
for the Southern District of New York
Richard M. Berman, Judge

Before: WALKER, Chief Judge, and KEARSE and CABRANES, Circuit Judges.

OPINION

KEARSE, Circuit Judge:

Plaintiff Ideal Steel Supply Corp. ("Ideal") appeals from a judgment of the United States District Court for the Southern District of New York, Richard M. Berman, Judge, dismissing its amended complaint, brought principally under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (2000) ("RICO"), alleging that Ideal's

business had been injured by reason of the practice of defendants National Steel Supply, Inc. ("National"), et al., of failing to charge certain customers sales taxes as required by New York State ("State") law and thereafter sending the State Department of Taxation and Finance ("State Tax Department") fraudulent sales tax reports by mail and wire, in violation of 18 U.S.C. §§ 1341 and 1343. Ideal also asserted a state-law claim for breach of contract. The district court dismissed the RICO claims pursuant to Fed. R. Civ. P. 12(b)(6), ruling that the complaint did not state a claim under 18 U.S.C. § 1964(c) because it failed to allege the necessary causation, in that it did not, and could not, assert that the alleged misrepresentations had been relied on by Ideal. The court declined to exercise supplemental jurisdiction over the contract claim and dismissed that claim without prejudice. On appeal, Ideal contends that it adequately pleaded that its lost sales were proximately caused by National's pattern of offering customers lower bottom-line cost by means of the unlawful omission of state sales tax and concealing those omissions by means of mail and wire fraud. For the reasons that follow, we agree.

I. BACKGROUND

We summarize below the allegations of the amended complaint ("complaint"), the truth of which is assumed as is required on review of a Rule 12(b)(6) dismissal. We take those allegations, and the reasonable inferences that can be drawn from them, in the light most favorable to Ideal.

A. The Competitors

Ideal is in the business of purchasing steel mill products from manufacturers outside of New York State and selling those products and related hardware and services to

professional ironworkers, small steel fabricators, and do-it-yourself homeowners, for use in the New York, New Jersey, and Connecticut area. It has retail stores in Queens and the Bronx.

National, which is owned by defendants Joseph and Vincent Anza (collectively "the Anzas"), sells substantially the same products as Ideal to essentially the same customer base. National has retail outlets in Queens and the Bronx, located a few minutes' drive from Ideal's stores.

Ideal and National are the only substantial competitors in the Bronx or Queens for sales of the steel products they carry. No businesses in those areas other than Ideal and National carry "the same or a similar comprehensive array of products and services or compete for the same customers." (Complaint ¶ 3.) Given the similarity of their product lines (which comprise "generic commodities," *id.*) and the proximity of their retail outlets to each other in each Borough, Ideal and National compete against one another "primarily on the basis of price" (Complaint ¶ 21); "differences in prices charged by Ideal and National affect customers' decisions to purchase from one or the other" (Complaint ¶ 22). Price fluctuation, however, does not affect overall demand for the products offered by Ideal and National; rather, overall demand is determined by "economic activity in the real estate and construction businesses" and other considerations beyond the control of National or Ideal. (*Id.*)

B. The Allegedly Fraudulent Scheme

Under State law, Ideal and National are required to charge, collect, and remit to the State a combined state and local sales tax of 8B percent on any sale for which the customer does not qualify for an exemption. (*See* Complaint

¶¶ 23-25.) All sales are presumed by law to be taxable unless, within 90 days of purchase, the purchaser presents to the seller a valid resale or exemption certificate. (Complaint ¶ 23.)

Both Ideal and National conduct much of their business on a cash-and-carry basis. According to the complaint, Ideal complies with the state-law requirements that it charge and pay sales taxes, but National does not. The complaint alleged that, at the direction of the Anzas, National does not charge cash-paying non-exempt customers any sales tax; this allows those customers to save 8B percent on their purchases, thereby incurring a substantially lower bottom-line cost than they would incur by purchasing the same items from Ideal.

In order to maintain its profit margin while drawing customers away from Ideal with these unlawful "cash, no tax" sales, National, having refused to charge and collect the sales tax, simply does not pay the tax due on those sales. To conceal the amounts due, National has, since at least 1998, submitted fraudulent sales tax reports to the State Tax Department, failing to report those sales and misrepresenting its total taxable sales. (Complaint ¶¶ 29-30.) National has filed the fraudulent reports, which are essential to the success of this scheme, by mail and wire, in violation of 18 U.S.C. §§ 1341 and 1343.

Ideal commenced the present action in 2002, alleging that National's "cash, no tax" sales, along with the necessary fraudulent reporting, were intended to and did injure Ideal's business. The complaint alleged that National's repeated fraudulent mailings and/or wire transmissions--on which the State Tax Department relied and continues to rely, enabling National to avoid paying sales tax on a significant portion of its taxable sales--constituted a pattern of racketeering activity

that "continues to the present day." (Complaint ¶ 30.) Ideal alleged that its own list prices were, on average, no higher than those of National, and that but for defendants' "cash, no tax" scheme, National would have had no competitively significant price advantage over Ideal. The complaint alleged that as a result of the Anzas' operation of National through the above pattern of racketeering activity, in violation of RICO § 1962(c), Ideal had suffered "lost profits in an amount . . . believed to exceed $ 5,000,000." (Complaint ¶ 51.)

In addition, the complaint alleged that the Anzas and National had violated RICO § 1962(a) by using profits gained from the "cash, no tax" scheme at National's Queens facility to open its outlet in the Bronx. (*See* Complaint ¶ 55.) That investment of racketeering income, along with defendants' implementation of the "'cash, no tax' scheme at that location" as well caused Ideal's Bronx outlet to "los[e] significant business and market share" (Complaint ¶ 57) resulting in damages in excess of $2,000,000 (*see* Complaint ¶ 58).

The complaint also alleged that defendants' "cash, no tax" scheme violated the terms of an agreement that had settled an earlier lawsuit between the parties. (Complaint ¶ 66.) The complaint requested treble damages on each RICO claim and single damages on the contract claim.

C. The Decision of the District Court

Defendants moved to dismiss the complaint pursuant to, inter alia, Fed. R. Civ. P. 12(b)(6), arguing that Ideal lacked standing to bring its RICO claims because it had not adequately alleged that its injuries were proximately caused by defendants' alleged violations of § 1962. In a Decision and Order reported at 254 F. Supp. 2d 464 (2003), the district court granted the motion, stating in part as follows:

> Generally, to satisfy RICO's causation element a complaint must allege that a defendant's violation was both a "but for" or factual cause of plaintiff's injury and the proximate cause, as well. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265-68, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992). In complaints predicated on mail or wire fraud, a plaintiff must plead "'loss causation,' meaning that the misrepresentation must be both an actual and a proximate source of the loss that the plaintiffs suffered," *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 169-70 (2d Cir. 1999), and "transaction causation," which requires a plaintiff to "demonstrate that [plaintiff] relied on defendants' misrepresentations." *Mezzonen, S.A. v. Wright*, 1999 U.S. Dist. LEXIS 17625, 97 CIV. 9380, 1999 WL 1037866, at *5 (S.D.N.Y. Nov. 16, 1999); *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings*, 85 F. Supp. 2d 282, 302 (S.D.N.Y. 2000), aff'd 2 Fed.Appx. 109, 2001 WL 46565 (2d Cir. Jan. 18, 2001); *see also Moore*, 189 F.3d at 171-72; *Powers v. British Vita, P.L.C.*, 57 F.3d 176, 189 (2d Cir. 1995)
>
> . . . .

254 F. Supp. 2d at 467-68 (emphasis in original). The court ruled that Ideal had failed to plead transaction causation:

> Although Ideal alleges that the New York State Department of Taxation and Finance relied on Defendants' alleged misrepresentations (ACP30), Ideal has not alleged--indeed can not allege--that Plaintiff relied on the sales tax returns Defendants mailed or

> wired to the New York State Department of Taxation and Finance. As a result, Ideal's RICO claims fail.

Id. at 468.

The court stated that although some RICO claims, such as those asserted in *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374 (2d Cir. 2001), are based on predicate acts that do not involve reliance, a RICO plaintiff must be able to show reliance--its own reliance--when the alleged racketeering activity on which its RICO claim is based is mail fraud or wire fraud. *See id.* at 468-69.

Having concluded that Ideal's RICO claims must be dismissed pursuant to Rule 12(b)(6), the court declined to exercise supplemental jurisdiction over Ideal's contract claim, and it dismissed that claim without prejudice. Judgment was entered accordingly, and this appeal followed.

II. DISCUSSION

On appeal, Ideal contends that, despite the fact that it did not itself rely on National's mail and wire frauds, it has standing to assert its civil RICO claims because it alleged facts sufficient to show that injury to its business was proximately caused by National's pattern of racketeering activity and investment of racketeering income. Because the complaint alleges that Ideal was a competitor of National and was an entity directly targeted for injury by National's racketeering activity, we agree.

A. Mail and Wire Fraud Racketeering Activity

RICO authorizes a private right of action for treble damages by a "person injured in his business or property by

reason of a violation of section 1962 of [Title 18]." 18 U.S.C. § 1964(c). Section 1962 provides, in pertinent part, that

> it shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in . . . the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce,

18 U.S.C. § 1962(a), and that

> it shall be unlawful for any person . . . associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity,

id. § 1962(c).

RICO defines racketeering activity to include mail fraud in violation of 18 U.S.C. § 1341 and wire fraud in violation of 18 U.S.C. § 1343. *See* 18 U.S.C. § 1961(1). The mail and wire fraud statutes prohibit the use of those means of communication in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343. The mailing of false state sales tax returns may constitute mail fraud in violation of § 1341. *See, e.g., United States v. Porcelli*, 865 F.2d 1352, 1360-61 (2d Cir.), *cert. denied*, 493 U.S. 810, 110 S. Ct. 53, 107 L. Ed. 2d 22 (1989); *see also United States v. Slevin*, 106 F.3d 1086,

1088 (2d Cir. 1996) ("Because the[mail and wire fraud] statutes use the same relevant language, they are analyzed in the same way.").

Generally, two or more related acts of racketeering activity may be considered a "pattern" of racketeering activity. *See* 18 U.S.C. § 1961(5); *United States v. Indelicato*, 865 F.2d 1370, 1381-84 (2d Cir.) (*en banc*), *cert. denied*, 491 U.S. 907, 109 S. Ct. 3192, 105 L. Ed. 2d 700 (1989).

B. Civil RICO Claims and Proximate Causation

The requirement in § 1964(c) that a civil RICO plaintiff show that it was injured in its business or property "by reason of" the defendant's RICO violation means that the plaintiff must plead and prove that the violation not only was the logical, or "but for," cause of the injury but also was its legally cognizable, or proximate, cause. *See, e.g., Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992); *Baisch v. Gallina*, 346 F.3d 366, 372 (2d Cir. 2003); *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 123 (2d Cir.), *cert. denied*, 124 S. Ct. 532, 157 L. Ed. 2d 424 (2003); *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374, 380 (2d Cir. 2001) ("*Commercial Cleaning*"); *In re American Express Co. Shareholder Litigation*, 39 F.3d 395, 399 (2d Cir. 1994) ("*American Express*").

> "Central to the notion of proximate cause is the idea that a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom may have been injured by his conduct, but only those with respect to whom his acts were 'a substantial factor in the sequence of responsible causation,' and whose injury was

> 'reasonably foreseeable or anticipated as a natural consequence.'"

Lerner v. Fleet Bank, N.A., 318 F.3d at 123 (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2d Cir. 1994) (quoting *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23-24 (2d Cir. 1990)), *cert. denied*, 513 U.S. 1079, 115 S. Ct. 728, 130 L. Ed. 2d 632 (1995)).

> The requirement that a defendant's actions be the proximate cause of a plaintiff's harm represents a policy choice premised on recognition of the impracticality of asserting liability based on the almost infinite expanse of actions that are in some sense causally related to an injury. *See Sperber v. Boesky*, 849 F.2d 60, 63 (2d Cir. 1988). In marking that boundary, the Supreme Court has emphasized that a plaintiff cannot complain of harm so remotely caused by a defendant's actions that imposing legal liability would transgress our "ideas of what justice demands, or of what is administratively possible and convenient."

Commercial Cleaning, 271 F.3d at 380 (quoting *Holmes*, 503 U.S. at 268 (other internal quotation marks omitted)).

1. Operating an Enterprise in Violation of § 1962(c)

Applying these principles to claims that the affairs of a RICO enterprise have been conducted in violation of subsection (c) of § 1962, we have upheld dismissals of a variety of civil RICO complaints where the alleged injury was too remote from the alleged racketeering activity. For example, in *Sperber v. Boesky*, 849 F.2d 60 (2d Cir. 1988),

the plaintiffs sought damages from a defendant convicted of insider trading in certain stocks, alleging that the plaintiffs lost money investing in other companies in which the defendant was a also shareholder. Plaintiffs' theory was that the defendant's reputation as a successful investor--gained as a result of his pattern of insider trading--had artificially inflated the prices of the stocks purchased by the plaintiffs. The complaint alleged that the plaintiffs suffered investment losses as the prices of those shares fell following the defendant's conviction for insider trading. *See id.* at 62. We affirmed the Rule 12(b)(6) dismissal because the alleged injuries were too remote from the defendant's unlawful activity.

In *Hecht v. Commerce Clearing House, Inc.*, the plaintiff brought a civil RICO action against his former employer and co-workers, alleging that they had implemented a scheme to defraud customers in violation of the mail fraud and wire fraud statutes. The plaintiff alleged that he had been injured by the fraudulent scheme both because clients whom he had serviced had discovered the frauds and ceased to do business with his employer, thereby costing him commissions he would have otherwise earned, and because he had been fired for refusing to participate in the frauds. *See* 897 F.2d at 22-24. We upheld the district court's dismissal of the plaintiff's claims, explaining that the plaintiff was "'neither the target of the racketeering enterprise nor the competitor[] nor the customer[] of the racketeer[s],'" and that the plaintiff's injuries, as a result, were not "reasonably foreseeable . . . natural consequence[s] of the RICO violations" for purposes of § 1964(c). *Id.* at 24 (quoting *Sperber v. Boesky*, 849 F.2d at 65).

In *Lerner v. Fleet Bank, N.A.*, the plaintiffs, who had invested with an attorney who absconded with their money,

brought civil RICO claims against the banks in which their funds had been deposited. The plaintiffs claimed that the banks had engaged in racketeering activity, to wit, mail and wire fraud, by sending back to various payees bounced checks that the banks stamped "refer to maker," rather than "insufficient funds"; telling some payees that their checks had been dishonored because of a computer error or because the check had been written on the wrong account, rather than because the attorney had insufficient funds; and sending statements to the attorney that did not mention the dishonored checks. *See* 318 F.3d at 119. The plaintiffs alleged that the banks also failed to report the attorney's overdrafts and other defaults to state disciplinary authorities, which would have caused the attorney to be disbarred and thereby led the plaintiffs to discontinue their investments with him. We held that the connection between the plaintiffs' injuries and the banks' mailings, which obscured the attorney's criminal behavior, was far too attenuated to meet the requirement of proximate cause and that the complaint thus failed to state a civil RICO claim. *See id.* at 122-24.

In *American Express*, we upheld the Rule 12(b)(6) dismissal of a derivative action complaint by shareholders of American Express alleging that company officials had committed mail and wire frauds and repeated acts of bribery in an effort to defame one Edmond J. Safra, an American Express competitor. *See* 39 F.3d at 396-98. When the fraudulent acts were discovered, American Express was injured by, *inter alia*, losing business and goodwill and having to pay millions of dollars in legal fees and settlements. We upheld the dismissal of the complaint because the alleged injuries to the company were not proximately caused by the racketeering activities of fraud and bribery but rather were caused by the fact that those activities did not have their intended effect and were discovered by their intended target.

The target of the unlawful acts was Safra, not American Express; the "RICO defendants' scheme was 'an illicit scheme to injure a potential major competitor of [American Express].'" *Id.* at 400 (quoting the plaintiffs' brief on appeal).

> The injuries alleged thus were neither the "preconceived purpose" nor the "specifically-intended consequence" of the RICO defendants' acts. Moreover, any losses to American Express were caused only because the scheme itself was exposed and thus failed. Therefore, the harm to American Express was neither the "necessary result" of the scheme nor . . . "foreseeable" . . . .

Id.

We reached a similar result in *Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234 (2d Cir.), *cert. denied*, 519 U.S. 816, 117 S. Ct. 66, 136 L. Ed. 2d 27 (1996), in which the defendant advertising agency had paid nearly $1 million to two individual defendants who informed it, falsely, that Abrahams, then a Jamaican tourism official, could be bribed to grant the agency the Jamaican Tourism Board ("JTB") advertising business. Although none of the bribery money was ever given to Abrahams, he was indicted along with the scheme's participants. After the charges against him were dropped, Abrahams brought a civil RICO action alleging "injuries to his reputation and to his emotional, financial, political, and social status resulting from widespread public dissemination of false information about his role in the bribery scheme." *Id* at 236. We noted, however, that "Abrahams was neither an intended target of the scheme nor an intended beneficiary of the laws prohibiting it." *Id.* at 238. Nor was he injured by the scheme itself; rather, "Abrahams was injured . . . by the fallout from the scheme's exposure." *Id.* at 239.

We thus upheld the dismissal of Abrahams's complaint for failure to state a civil RICO claim on the ground that his injuries were not sustained "by reason of" the agency's racketeering activity within the meaning of § 1964(c).

In *Baisch v. Gallina*, in contrast, we reversed the grant of summary judgment dismissing the civil RICO claims asserted by a plaintiff lender against insurance brokers and an operator of Raycon Construction Co. ("Raycon"), a company that, in order to do business with Nassau County, was required "to provide the County with estimates of the number and type of workers needed for each project, along with the number of hours to be worked and the hourly rate per worker." 346 F.3d at 369. The complaint alleged that "the defendants engaged in a pattern of racketeering activity by causing Raycon to submit to Nassau County fraudulent documents, including inflated estimates and falsified claim vouchers." *Id.* Baisch entered into a factoring agreement with Raycon and lost money when Raycon submitted the fraudulent vouchers--and other vouchers not even submitted to the County--to him, and he advanced funds based on those fraudulent vouchers. The district court ruled that Baisch lacked standing to bring a civil RICO claim because the party directly injured by the alleged racketeering activity would have been the County. We disagreed with the premise that only one category of victim has standing to bring a civil RICO claim. We noted that the foreseeability component of proximate cause is established where the plaintiff was a "target[]" and "intended victim[] of the racketeering enterprise," *id.* at 374 (internal quotation marks omitted), even if he was not the primary target or victim, and that "no precedent suggests that a racketeering enterprise may have only one 'target,' or that only a primary target has standing," *id.* at 375. We noted that the frauds on Baisch and the County were intertwined, and we held that Baisch had standing to pursue a RICO claim based in part on the false

vouchers submitted to the County because "the defendants specifically targeted [him] as their victim allegedly by taking his loans under false pretenses and consciously creating a high risk of defaulting on those loans." *Id.*

In each of the above cases in which we approved the summary dismissal of the complaint, we noted that the plaintiffs were not competitors of the racketeering enterprise or targets of alleged racketeering activity. *See, e.g., Lerner v. Fleet Bank, N.A.*, 318 F.3d at 124 ("We have repeatedly emphasized that the reasonably foreseeable victims of a RICO violation are the targets, competitors and intended victims of the racketeering enterprise."); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d at 24 (plaintiff was "neither the target of the racketeering enterprise nor the competitor[] . . . of the racketeer[s]" (internal quotation marks omitted)); *Sperber v. Boesky*, 849 F.2d at 65 (plaintiffs were "neither the target of the racketeering enterprise nor the competitors nor the customers of the racketeer"). The view that a competitor alleging injury to its business resulting from racketeering activity of a defendant competitor adequately pleads proximate cause within the meaning of § 1964(c) is consistent with the Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). In *Sedima*, a divided Court ruled that a civil RICO plaintiff, who had alleged predicate acts of mail and wire fraud, could recover damages not only for "racketeering injury," but also for injury caused directly by RICO predicate acts. *See id.* at 495-96. Although the Court was divided on that issue, all members were in agreement that the principal persons for whose benefit the RICO private right of action was created included a defendant's "competitors . . . whose businesses and interests are harmed . . . or whose competitive positions decline because of infiltration in the relevant market," or who could "plead and prove that they suffered . . . injury to their

competitive, investment, or other business interests resulting from the defendant's conduct of a business . . . through a pattern of racketeering activity," 473 U.S. at 519-20 (Marshall, J., dissenting); *see* 473 U.S. at 497 n.15 (majority opinion, stating that damages recoverable under RICO "include, but are not limited to, the sort of competitive injury for which the dissenters would allow recovery").

In *Commercial Cleaning*, we reversed the Rule 12(b)(6) dismissal of a civil RICO complaint alleging that the plaintiff's competitor had engaged in a pattern of racketeering activity, to wit, knowingly hiring undocumented aliens in violation of 8 U.S.C. § 1324(a), which "enabled [the defendant] to lower its variable costs and thereby underbid competing firms, which consequently lost contracts and customers to [the defendant]." 271 F.3d at 378. We noted that the plaintiff was

> not alleging an injury that was derivative of injury to others. Commercial does not seek to recover based on the misfortunes visited upon a third person by the defendant's acts. . . . It claims to have lost profits directly as the result of [the defendant's] underbidding, which it achieved through its violation of § 1324(a). *See Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1343 (2d Cir. 1994) (holding that the value of business opportunities lost due to defendant's RICO violations is compensable); *Mid Atlantic Telecom Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 264 (4th Cir. 1994) (noting that plaintiff was not seeking to vindicate claims of customers who accepted defendant's fraudulent, ostensibly lower rates, but rather alleged "distinct and independent injuries: lost customers and lost revenues") . . . . We have stated a plaintiff has standing where the plaintiff

> is the direct target of the RICO violation. *See Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234, 238 (2d Cir. 1996); *American Express*, 39 F.3d at 400 (targets of RICO violations were competitive rivals not shareholders harmed by decrease in stock value upon exposure of scheme); *see also Mid Atlantic Telecom*, 18 F.3d at 263 (plaintiff has standing if it can show that it was a "direct target" of defendant's RICO violations). As discussed above, the theory of Commercial's claim is that Colin undertook the illegal immigrant hiring scheme in order to undercut its business rivals, thus qualifying them as direct targets of the RICO violation.

Commercial Cleaning, 271 F.3d at 384 (internal quotation marks omitted).

In the present case, the district court viewed our holding in *Commercial Cleaning* as inapposite here because the predicate acts alleged in that case were not frauds. We disagree with the court's conclusion. As revealed in the above quotation, *Commercial Cleaning* itself relied in part on the reasoning of cases such as *Abrahams v. Young & Rubicam Inc.* and *American Express*, in which the alleged predicate racketeering activities included acts of fraud. In particular, we cited with approval *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir.) ("*Mid Atlantic*"), *cert. denied*, 513 U.S. 931, 115 S. Ct. 323, 130 L. Ed. 2d 283 (1994), in which the Fourth Circuit held that a competitor had standing to bring a civil RICO claim where the only racketeering activities alleged were mail frauds in communications from the defendants to the plaintiff's customers. In that case, Mid Atlantic Telecom, Inc. ("Mid Atlantic"), and defendant Long Distance Services, Inc. ("LDS"), were resellers of long-distance telecommunications

services competing for the same customers. The complaint alleged that the defendants had engaged in a pattern of fraudulent mailings, soliciting customers by offering them artificially low rates, lower than Mid Atlantic's basic rates, forcing Mid Atlantic to meet the apparently lower LDS rates. However, "in practical effect, . . . the quoted [LDS] rates were not [as] low[as had been represented], since additional minutes were randomly and artificially added [by the defendants] to the lengths of telephone calls" made by LDS customers. *Mid Atlantic*, 18 F.3d at 261. The defendants contended that "Mid Atlantic d[id] not allege that it received mail or telephone solicitations offering artificially low rates, merely that its customers did"; that, therefore, defendants' "customers were the only victims of the alleged fraud"; and hence "the [defendants'] solicitations could not have been the proximate cause of Mid Atlantic's injuries." *Id.* at 263. The Fourth Circuit rejected these contentions and vacated the summary dismissal of the complaint, noting that Mid Atlantic was "not seeking [either] to vindicate the rights of its former customers who may have been offered fraudulently low rates" or to recover for injuries "derivative of any losses suffered by its former customers." *Id.* at 264. Rather, "Mid Atlantic alleges that LDS engaged in fraudulent use of the mails and telephone wires to entice customers away from Mid Atlantic and to eliminate Mid Atlantic as a competitor." *Id.* at 263. The court recognized that there may be more than one category of victims to whom a defendants' conduct can proximately cause injury, and that although the customers may have been the most direct victims of the defendants' alleged frauds, Mid Atlantic "claim[ed] distinct and independent injuries: lost customers and lost revenue due to the necessity of offering lower rates to match [the defendants'] fraudulent ones." *Id.* at 264.

> . . . Mid Atlantic may be able to show that while the scheme was initially aimed only at defrauding LDS customers, [the individual defendant] broadened the sweep of the intrigue to include Mid Atlantic as a direct target (i.e., to obtain an unfair competitive advantage in recruiting Mid Atlantic customers).

Id. at 263.

The *Mid Atlantic* holding that a civil RICO plaintiff might prevail by establishing that his injury was proximately caused by a defendant's mail frauds that were relied on by a third person is consistent with the view that this Court had adopted in *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990) ("*LILCO*"). In *LILCO*, the County of Suffolk had asserted a civil RICO claim alleging that defendants Long Island Lighting Company ("LILCO") and its officers committed mail fraud in the course of State Public Service Commission ("PSC") proceedings, inducing the PSC to grant LILCO unwarranted and excessive rate increases. Although we upheld the posttrial dismissal of that claim for lack of proof that the rate increases were in fact caused by the alleged frauds, we plainly accepted the principle that a RICO claim based on mail fraud may be proven where the misrepresentations were relied on by a third person, rather than by the plaintiff. Noting that the "by reason of" phrase in § 1964(c) "requires that there be a causal connection between the prohibited conduct and plaintiff's injury," 907 F.2d at 1311, and citing, *inter alia*, *Shaw v. Rolex Watch U.S.A., Inc.*, 726 F. Supp. 969 (S.D.N.Y. 1989) ("*Shaw*"), we stated that

> in the context of this case, which involves RICO mail fraud claims, this means that it was necessary for Suffolk to demonstrate at trial that LILCO's

> misrepresentations to the PSC were relied upon by the PSC, . . . and that such misrepresentations caused LILCO's rate increases to be granted.

LILCO, 907 F.2d at 1311 (emphases added). Although we ultimately found the trial evidence insufficient, we plainly adopted the principle stated in *Shaw* that "[a] plaintiff who is injured as a proximate result of fraud should be able to recover regardless of whether he or a third party is the one deceived," 726 F. Supp. at 973.

Although cases such as *United States v. Evans*, 844 F.2d 36 (2d Cir. 1988) ("*Evans*"), *Corcoran v. American Plan Corp.*, 886 F.2d 16 (2d Cir. 1989) ("*Corcoran*"), and *Metromedia Co. v. Fugazy*, 983 F.2d 350 (2d Cir. 1992) ("*Metromedia*"), *cert. denied*, 508 U.S. 952, 113 S. Ct. 2445, 124 L. Ed. 2d 662 (1993), have sometimes been cited for the proposition that a civil RICO claim based on mail or wire fraud cannot be established absent proof that the plaintiff itself relied on the misrepresentation, *see, e.g., Corcoran*, 886 F.2d at 21 (discussing a possible need for "convergence of the deceived and the injured"), none of those cases held that the plaintiff's own reliance was required. The *Evans* and *Corcoran* cases, which were decided under the then-prevailing *McNally* principle that fraudulent mailings did not violate § 1341 unless the scheme was designed to deprive the victim of money or property, *see McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987), superseded by statute, 18 U.S.C. § 1346, discussed the convergence theory but did not turn on reliance at all. They held that the government in *Evans* and the plaintiff New York State Superintendent of Insurance in *Corcoran* could not show that they had been deprived of money or property and hence had not even alleged RICO predicate acts. And in *Metromedia*, we stated that "the plaintiff was required to demonstrate that the

defendant's misrepresentations were relied on," 983 F.2d at 368 (emphasis added), without suggesting a limitation as to what entity's reliance would suffice, and we cited *LILCO*, 907 F.2d at 1311, which, as discussed above, plainly indicated that a plaintiff who is injured as a proximate result of fraud should be able to recover regardless of whether it was the plaintiff or a third party that was deceived. This Court has not held that the civil-RICO plaintiff who alleges mail fraud or wire fraud must have been the entity that relied on the fraud.

The principle that a plaintiff who is injured as a proximate result of RICO predicate acts of fraud need not prove his own reliance, rather than that of a third party, was also approved in our discussion in *American Express*, in which we ruled that American Express shareholders lacked standing to bring derivative civil RICO claims for losses the company incurred in connection with its mail fraud, wire fraud, and bribery-based efforts to defame Safra. Although Safra himself plainly could not have relied on the frauds, we stated that

> if appellants are correct that [individual defendants] violated RICO by defaming Safra, then Safra, as the target and victim of the scheme, could sue [them] under RICO and recover treble damages for injuries to his "business or property." *See* 18 U.S.C. § 1964(c).

American Express, 39 F.3d at 401.

In dismissing Ideal's complaint in the present case on the ground that a civil RICO plaintiff who alleges predicate acts of mail or wire fraud has not adequately pleaded transaction causation unless he has alleged that he himself relied on the fraudulent communications, the district court instead relied principally on our decisions in *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 169-72 (2d Cir. 1999), and *Powers v. British*

Vita, P.L.C., 57 F.3d 176, 189 (2d Cir. 1995). Although those cases contained such language, that language was used in the context of claims brought by plaintiffs who themselves were parties to the transactions that they claimed had been fraudulently induced. In such cases, i.e., where the plaintiff alleges that he was the person deceived, the transaction causation test is not an independent standing requirement but is merely shorthand for part of the normal causation analysis. *Moore* and *Powers* did not deal with circumstances such as those here, in which a plaintiff claims to have been directly harmed by means of a fraud perpetrated on another person, and their statements that the plaintiff must show his own reliance do not control the proximate cause analysis here.

Rather, the principle governing the present case is that where a complaint contains allegations of facts to show that the defendant engaged in a pattern of fraudulent conduct that is within the RICO definition of racketeering activity and that was intended to and did give the defendant a competitive advantage over the plaintiff, the complaint adequately pleads proximate cause, and the plaintiff has standing to pursue a civil RICO claim. This is so even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff.

In the present case, Ideal alleged facts sufficient to show that its claimed loss of business was proximately caused by defendants' operation of National's stores through a pattern of racketeering activity. According to the complaint, described in Parts I.A. and B. above, defendants' "cash, no tax" scheme was implemented for the purpose of diverting customers from Ideal, which collected the sales taxes required by law, to National, which did not. Given that Ideal and National sell substantially the same products and that their retail stores are but minutes apart, the lower bottom-line cost available to cash

purchasers from National as a result of not paying sales tax influenced some customers to purchase from National rather than from Ideal.

Defendants' mailings or electronic transmissions of fraudulent sales tax reports to the State Tax Department were an essential part of the "cash, no tax" scheme, for without the fraudulent reports, and the State's reliance on them, defendants would have had to pay the uncollected sales taxes out of their own assets. The principal intended victim of the scheme was Ideal, over which defendants sought to secure a competitive advantage by giving certain cash customers an unlawful benefit, and by concealing that unlawful conduct and retaining the resulting profits by means of racketeering activity. Accordingly, we conclude that Ideal, as a competitor directly targeted by defendants for competitive injury, has standing to assert its RICO claims against defendants for violations of § 1962(c) based on the alleged predicate acts of mail and wire fraud.

2. Investing Racketeering Income in Violation of § 1962(a)

Given the facts alleged in the complaint, we also conclude that Ideal has standing to assert its § 1962(a) claim. A plaintiff may state a civil RICO claim for violation of subsection (a) by alleging that a defendant has received "income derived, directly or indirectly, from a pattern of racketeering activity" and has "use[d] or invest[ed]" any part of that income "directly or indirectly" in an enterprise engaged in interstate commerce, 18 U.S.C. § 1962(a). Under that section, the complaint "must allege injury 'by reason of' defendants' investment of racketeering income in an enterprise," as distinct from injury traceable simply to the predicate acts of racketeering alone or to the conduct of the business of the

enterprise. *See Ouaknine v. MacFarlane*, 897 F.2d 75, 82-83 (2d Cir. 1990).

Here, part of the proceeds of defendants' alleged "cash, no tax" scheme may properly be viewed as racketeering income, indirectly derived from their pattern of mail and wire frauds, given that those frauds enabled defendants to avoid paying 8B< percent of those proceeds to the State. And the complaint alleges that defendants used profits gained from the operation of their "cash, no tax" scheme at National's Queens location to fund the opening of their retail outlet in the Bronx near Ideal's outlet in that Borough. The complaint adequately stated a claim on which relief can be granted under § 1964(c) for a violation of § 1962(a).

C. Defendants' Alternative Arguments for Affirmance

We also reject defendants' contentions that the dismissal of the complaint may be upheld on either of two alternative grounds. First, they contend that we should affirm because the problems of proof inherent in Ideal's theory of causation are intractable, as its business losses may have resulted from any of a number of economic factors unrelated to National's alleged practice of failing to charge and pay sales tax. (*See* Defendants' brief on appeal at 20-22.) The evidentiary difficulty hypothesized by defendants, however, is not a proper basis for a dismissal pursuant to Rule 12(b)(6) for failure to state a claim. *See, e.g., Commercial Cleaning*, 271 F.3d at 382-83; *see also Emergent Capital Investment Management, LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 197 (2d Cir. 2003) (potential difficulty in establishing "chain of causation . . . . is a matter of proof at trial and not to be decided on a Rule 12(b)(6) motion to dismiss").

Second, defendants argue that the judgment of the district court should be affirmed because Ideal failed to allege that defendants' electronic filings were interstate, a jurisdictional element of the wire fraud offense described in § 1343. *See generally Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 243 (2d Cir. 1999) (a § 1343 offense "requires that the defendant communicate by wire in 'interstate or foreign commerce'"; a "purely intrastate communication [is] beyond the statute's reach" (other internal quotation marks omitted)). Defendants argue that because National is located in New York and the allegedly false tax reports were filed within the State, National's electronic tax filings cannot have violated the wire fraud statute. This contention is both substantively and procedurally flawed. As a matter of substance, it is possible for a wire communication whose origin and ultimate destination are within a single state to be routed through another state. *See, e.g., United States v. Davila*, 592 F.2d 1261, 1263 (5th Cir.) (upholding § 1343 wire fraud conviction of a defendant who used Western Union wire transfers to send money between San Antonio and McAllen, Texas, which were routed through Middletown, Virginia), *reh'g denied*, 597 F.2d 283, *cert. denied*, 444 U.S. 843, 100 S. Ct. 85, 62 L. Ed. 2d 56 (1979); *see also United States v. Blassingame*, 427 F.2d 329, 330 (2d Cir. 1970) (defendant need not know that its wire communication travels through interstate commerce for § 1343 to be applicable), cert. denied, 402 U.S. 945 91 S. Ct. 1629, 29 L. Ed. 2d 114 (1971). As a matter of procedure, the question of whether Ideal will be able to prove that pertinent wire communications by defendants traveled interstate is a matter for trial, not for resolution on a motion pursuant to Rule 12(b)(6). Further, even if it were clear that defendants' wire transmissions were purely intrastate, that would not warrant dismissal of the complaint, for the complaint alleges not only wire fraud but mail fraud. There is no requirement that mail travel interstate

for its sender to violate § 1341. *See, e.g., United States v. Gil*, 297 F.3d 93, 99-100 (2d Cir. 2002).

CONCLUSION

We have considered all of defendant's arguments in support of affirmance and have found them to be without merit. The judgment dismissing the RICO claims is vacated for the reasons stated above. We also vacate the dismissal of the state-law contract claim, over which the district court declined to exercise supplemental jurisdiction because of its dismissal of the RICO claims. The matter is remanded for further proceedings not inconsistent with this opinion.